

## CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet (SEE INSTRUCTIONS ON PAGE TWO.)

## I. (a) PLAINTIFFS

BOARD OF TRUSTEES OF THE LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA; BOARD OF TRUSTEES OF THE LABORERS VACATION-HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA; BOARD OF TRUSTEES OF THE LABORERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA and BOARD OF TRUSTEES OF THE LABORERS TRAINING AND RETRAINING TRUST FUND FOR NORTHERN CALIFORNIA

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF \_\_\_\_\_  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)  
Ronald L. Richman, SBN 139189  
Bullivant Houser Bailey PC  
601 California St., Suite 1800  
San Francisco, CA 94108  
415-352-2700

## DEFENDANTS

K.M. JACKSON ENGINEERING, INC., a California corporation and  
KURT THOMAS McFADDEN, an individual

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT \_\_\_\_\_  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

ATTORNEYS (IF KNOWN)

8 08 3556 TEH

## II. BASIS OF JURISDICTION (PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff  
☐ 2 U.S. Government Defendant  
☒ 3 Federal Question (U.S. Government Not a Party)  
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

## IV. ORIGIN

(PLACE AN "X" IN ONE BOX ONLY)

- ☒ 1 Original Proceeding  
☐ 2 Removed from State Court  
☐ 3 Remanded from Appellate Court  
☐ 4 Reinstated or Reopened  
☐ 5 Transferred from Another district (specify)  
☐ 6 Multidistrict Litigation  
☐ 7 Appeal to District Judge from Magistrate Judgment

## V. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 RR & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Amer w/ disab- Empl <input type="checkbox"/> 446 Amer w/ disab -Other <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Satellite TV	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motion to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt Relations <input type="checkbox"/> 730 Labor/Mgmt Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input checked="" type="checkbox"/> 791 Empl.Ret. Inc. Security Act	<b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (US Plaintiff or Defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609

## VI. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

Breach of collective bargaining agreement; 29 USC §§ 185, 1145

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION DEMAND\$ 40,338 CHECK YES only if demanded in complaint:  
UNDER F.R.C.P 23 JURY DEMAND: ☐ YES ☒ NO

VIII. RELATED CASE(S) IF ANY PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE".

## IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2)

(PLACE AND "X" IN ONE BOX ONLY)

☒ SAN FRANCISCO/OAKLAND

☐ SAN JOSE

DATE July 17, 2008

SIGNATURE OF ATTORNEY OF RECORD

By

*Kurt Thomas McFadden*

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS-44

Authority For Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs - Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a). F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS-44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

V. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section IV above, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause.

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS-44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases. Date and Attorney Signature.

Date and Attorney Signature. Date and sign the civil cover sheet.

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Attorneys for Plaintiffs  
Laborers Trust Funds

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BOARD OF TRUSTEES OF THE  
LABORERS HEALTH AND WELFARE  
TRUST FUND FOR NORTHERN  
CALIFORNIA; BOARD OF TRUSTEES OF  
THE LABORERS VACATION-HOLIDAY  
TRUST FUND FOR NORTHERN  
CALIFORNIA; BOARD OF TRUSTEES OF  
THE LABORERS PENSION TRUST FUND  
FOR NORTHERN CALIFORNIA; and  
BOARD OF TRUSTEES OF THE  
LABORERS TRAINING AND RETRAINING  
TRUST FUND FOR NORTHERN  
CALIFORNIA,

Plaintiffs,

v.

K. M. JACKSON ENGINEERING, INC., a  
California corporation and KURT THOMAS  
McFADDEN, an individual,

Defendants.

CV 08

Case No.:

3556

**COMPLAINT FOR DAMAGES FOR  
BREACH OF COLLECTIVE  
BARGAINING AGREEMENT**

[29 U.S.C. § 185(a) and 29 U.S.C. §§ 1109,  
1132(g)(2), 1145]

Now come the Plaintiffs, hereinabove named, and for their causes of action against  
Defendants, and each of them, allege as follows:

**I. JURISDICTION AND VENUE**

1. This is an action for damages for breach of the collective bargaining agreement  
described below and for injunctive relief. This Court has jurisdiction of the action under and  
pursuant to the provisions of 29 U.S.C. § 185 (§ 301 of the Labor Management Relations Act of

1 1947, as amended) and 29 U.S.C. §§ 1132(a)(3) and 1132(e)(1) (§§ 502(a)(3) and 502(e)(1) of  
2 the Employee Retirement Income Security Act of 1974, as amended) (“ERISA”). The suit  
3 arises from the defendants’ failure to permit an audit of their books and records as required by  
4 the collective bargaining agreements, by the written trust agreements and by provisions of  
5 federal law.

6 2. Venue of the within action is properly laid in the U.S. District Court for the  
7 Northern District of California in that, under ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2),  
8 contributions are made to, and benefits are paid from, a corporate co-trustee bank in the  
9 Northern District of California.

## 10 **II. PARTIES**

11 3. The Laborers Health and Welfare Trust Fund for Northern California, Laborers  
12 Vacation-Holiday Trust Fund for Northern California, Laborers Pension Trust Fund for  
13 Northern California, and Laborers Training and Retraining Trust Fund for Northern California  
14 are the Plaintiffs herein. The Laborers Health and Welfare Trust Fund for Northern California,  
15 Laborers Vacation-Holiday Trust Fund for Northern California, Laborers Pension Trust Fund  
16 for Northern California, and Laborers Training and Retraining Trust Fund for Northern  
17 California (“the Trust Funds”) are trust funds organized under and pursuant to the provisions of  
18 §§ 302(c)(5) and 302(c)(6) of the Labor Management Relations Act of 1947, as amended, 29  
19 U.S.C. §§ 186(c)(5) and 186(c)(6). The Trust Funds were established through collective  
20 bargaining agreements between the Northern California District Council of Laborers and  
21 employer associations representing construction industry employers doing business in Northern  
22 California. The Trust Funds are employee benefit plans created by written trust agreements  
23 subject to and pursuant to §§ 3(3) and 3(37) of ERISA, 29 U.S.C. §§ 1002(3) and (37). The  
24 Boards of Trustees, as fiduciaries, are the plaintiffs, who sue on behalf of the Trust Funds.

25 4. Each of the Trust Funds is a third party beneficiary of the collective bargaining  
26 agreement described below.

27 5. At all times mentioned herein, each of the Trust Funds was an express trust  
28 created by a written trust agreement subject to and pursuant to § 302 of the Labor Management

1 Relations Act, 29 U.S.C. § 186, and a multi-employer benefit plan within the meaning of  
2 sections 3 and 4 of ERISA, 29 U.S.C. §§ 1002, 1003.

3 6. The Trust Funds provide a variety of benefits for laborers, retired laborers and  
4 other related covered employees on whose behalf contributions are made pursuant to collective  
5 bargaining agreements. The duties of the Board of Trustees of the Trust Funds include ensuring  
6 that employers who are signatories to said collective bargaining agreements comply with the  
7 terms of those agreements with respect to payments and contributions to the Trust Funds.

8 7. Plaintiffs are informed and believe, and upon that ground allege, that at times  
9 material hereto, K. M. Jackson Engineering, Inc. ("KM Jackson") was a California corporation  
10 operated and controlled by Defendant Kurt Thomas McFadden ("McFadden") with its principal  
11 place of business located in Stockton, California. Plaintiffs are further informed and believe,  
12 and upon that ground allege, that KM Jackson and McFadden are and have been an employer  
13 within the meaning of Section 3(5) and Section 515 of ERISA, 29 U.S.C. §§ 1002(5), 1145 and  
14 an employer in an industry affecting commerce within the meaning of Section 301 of the  
15 LMRA, 29 U.S.C. § 185.

### 16 **III. FIRST CLAIM FOR RELIEF**

#### 17 **(Breach of Collective Bargaining Agreement)**

18 8. Plaintiffs reallege and incorporate by reference, as though fully set forth, the  
19 allegations contained in paragraphs 1-7 of this Complaint.

20 9. By virtue of its membership in the Engineering and Utility Contractors  
21 Association ("EUCA"), defendants became bound to a written collective bargaining agreement  
22 with the Northern California District Council of Laborers ("Laborers Union") entitled the  
23 Laborers' Master Agreement For Northern California ("Master Agreement"). In agreeing to be  
24 bound to the Master Agreement, defendants further agreed to be subject to and bound by all  
25 provisions and conditions of the written Trust Agreements which established the trust funds.  
26 Pursuant to the provisions of the Master Agreement, defendants agreed to be bound by all terms  
27 relating to wages, hours and conditions of employment prescribed therein with the Laborers  
28 Union.

1           10. By virtue of the Master Agreement and written trust agreements, defendants  
2 promised and agreed that: (1) they would pay employee fringe benefit contributions into each  
3 Trust Fund in regular monthly installments commencing on or before the 15th day of the month  
4 immediately succeeding the month in which the employee's work was performed; (2) that in the  
5 event that any of said monthly installments were not paid in full on or before the 25th day of the  
6 month in which such contributions became due, they would pay interest on the delinquent  
7 contribution in the amount of 1.5% per month until paid in full, and would also pay the amount  
8 of \$150.00 for each delinquent contribution as liquidated damages, and not as a penalty; and (3)  
9 that if any suit with respect to any of said contributions or payments were filed against them,  
10 defendants would pay into said Trust Funds the attorneys' fees, costs and all other expenses  
11 incurred in connection with such suit.

12           11. The Master Agreement between the Laborers Union and defendants has never  
13 been terminated.

14           12. Plaintiffs have performed all conditions, covenants and promises on their part to  
15 be performed in accordance with the terms and conditions of the Master Agreement and Trust  
16 Agreements.

17           13. Within four years last past, defendants materially breached and broke the  
18 aforesaid Master Agreement and trust agreements in the following respects:

- 19                   a. by failing to pay to report and failing to pay employee fringe benefit  
20                   contributions (not reported, not paid) for the period March and June  
21                   2004 in the principal amount of \$16,629.74;
- 22                   b. by failing to pay interest on the unpaid and delinquent employee fringe  
23                   benefit contributions (not reported, not paid), in an amount calculated to  
24                   be \$12,154.11 as of May 25, 2008; and
- 25                   c. by failing to pay liquidated damages and interest on employee fringe  
26                   benefit contributions that were paid, but paid late, for the period May –  
27                   October 2004, February, March, May – December 2005, January –  
28                   November 2006 in the amount of \$8,937.78 as of May 25, 2008.

1           14.     The aforesaid material breaches proximately caused damages to plaintiffs in the  
2 following approximate amounts, all according to proof at trial: (a) for unpaid contributions (not  
3 reported, not paid) in the principal amount of \$16,629.74 plus interest and liquidated damages in  
4 the sum of \$12,154.11 through May 25, 2008; and (b) liquidated damages and interest on  
5 contributions paid, but paid late, in the amount of \$8,937.78 as of May 25, 2008. Interest will  
6 continue to accrue at the rate of 1.5% each month during the pendency of this lawsuit.

7           15.     Plaintiffs have incurred and will continue to incur attorneys' fees in the within  
8 action. Pursuant to the provisions of the Master Agreement and the trust agreements, Plaintiffs  
9 request that the Court award plaintiffs their attorneys' fees and costs incurred in the bringing of  
10 the within action.

11           WHEREFORE, plaintiffs pray for judgment as set forth below.

12                               **IV. SECOND CLAIM FOR RELIEF**

13                               **(Recovery of Unpaid Trust Fund Contributions)**

14                               **(ERISA §§ 502(g)(2), 515)**

15           16.     Plaintiffs reallege and incorporate by reference, as though fully set forth, the  
16 allegations contained in paragraphs 1-15 of this Complaint.

17           17.     ERISA Section 515, 29 U.S.C. §1145, requires defendants to make such  
18 contributions to the plaintiff Trust Funds as are required under the terms of their collective  
19 bargaining agreement with the Union. Pursuant to the provisions of their trust agreements,  
20 plaintiffs are entitled to enforce defendants' obligations to make those contributions.

21           18.     Plaintiffs are informed and believe, and on that ground allege, that defendants  
22 failed to report and failed to pay all employee fringe benefit contributions (not reported, not  
23 paid) into each Trust Fund for the period March and June 2004 in the principal amount of  
24 \$16,629.74. Defendants are further obligated by the provisions of the Master Agreement and  
25 the Trust Agreements to pay interest on unpaid contributions at the rate of 1.5% per month until  
26 paid and liquidated damages in the amount of \$150.00 for each month that defendants failed to  
27 timely report and pay all employee fringe benefit contributions into each Trust Fund.

19. Pursuant to the provisions of ERISA, Section 502(g)(2), 29 U.S.C. §1132(g)(2), plaintiffs are entitled to the following statutory relief:

- (a) Section 502(g)(2)(B): for contributions not reported and not paid, an award of interest on the unpaid fringe benefit contributions at the rate of 1.5% per month, from the date of the delinquency, until the date of judgment, calculated to be \$11,854.11 through May 25 2008; and
- (b) Section (g)(2)(C): the additional award of an amount equal to the greater of
  - (i) interest on the unpaid fringe benefit contributions at the rate of 1.5% per month, from the date of the delinquency, until the date of judgment or; (ii) liquidated damages under the Master Agreement and trust agreements of \$150.00 for each month that defendants failed to timely report and pay all employee fringe benefit contributions into each Trust Fund, calculated to be \$11,854.11 through May 25 2008 for contributions not paid.

20. Plaintiffs have incurred and will continue to incur attorneys' fees in the within action. Pursuant to the provisions of §502(g)(2)(D) of ERISA, 29 U.S.C. §1132(g)(2)(D), plaintiffs request that the Court award plaintiffs their attorneys' fees and costs incurred in the bringing of the within action.

WHEREFORE, plaintiffs pray for judgment as set forth below.

#### **V. THIRD CLAIM FOR RELIEF**

##### **(Breach of Fiduciary Duty)**

##### **(ERISA §§ 409(a) and 502(a)(2))**

21. Plaintiffs reallege and incorporate by reference, as though fully set forth, the allegations contained in paragraphs 1-20 of this Complaint.

22. Pursuant to the trust agreements establishing the Trust Funds, the funds' assets include employee fringe benefits contributions that are required to be made to the Trust Funds. Employee fringe benefit contributions that are due and become delinquent are therefore assets of the Trust Funds.

1           23.     Plaintiffs are informed and believe, and on that ground allege, that at all relevant  
2 times, McFadden operated and controlled KM Jackson and as such, exercised authority or  
3 control over the payment of the employee fringe benefit contributions required to be made to the  
4 Trust Funds by KM Jackson and that McFadden was a fiduciary as defined by ERISA Section  
5 3(21), 29 U.S.C. § 1002(21), and was therefore also a party in interest as defined by ERISA  
6 Section 3(14)(A), 29 U.S.C. § 1002(14)(A). At all relevant times, defendant KM Jackson was  
7 an employer whose employees were covered by the Trust Funds' plans and was a party in  
8 interest within the meaning of ERISA Section 3(14)(C), 29 U.S.C. § 1002(4)(C).

9           24.     Plaintiffs are informed and believe, and on that ground allege, that defendant  
10 McFadden's role in KM Jackson's failure to make the employee fringe benefit contributions that  
11 became due to the Trust Funds constituted a breach of his fiduciary duties, in that he failed to  
12 act for the exclusive purpose of providing benefits to participants in the Trust Funds' plans and  
13 their beneficiaries, and instead dealt with these assets of the Trust Funds in his own interest  
14 and/or in the interest of Concrete Surfacing Systems. Plaintiffs are authorized to seek relief for  
15 this breach under ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2). As a result of said  
16 breaches, defendant McFadden has become indebted to plaintiffs as follows:

- 17                   a.     by failing to report, and failing to pay employee fringe benefit  
18                             contributions (not reported, not paid) for the period March and  
19                             June 2004 in the principal amount of \$16,629.74;
- 20                   b.     by to pay interest and liquidated damages on the unpaid and  
21                             delinquent employee fringe benefit contributions, in an amount  
22                             calculated to be \$12,154.11 as of May 25, 2008; and
- 23                   c.     by failing to pay liquidated damages and interest on employee  
24                             fringe benefit contributions that were paid, but paid late, for the  
25                             period May – October 2004, February, March, May – December  
26                             2005, January – November 2006 in the amount of \$8,937.78 as of  
27                             May 25, 2008.

1 The aforesaid material breaches proximately caused damages to plaintiffs in the  
2 following approximate amounts, all according to proof at trial: (a) for unpaid contributions (not  
3 reported, not paid) in the principal amount of \$16,629.74 plus interest and liquidated damages in  
4 the sum of \$12,154.11 through May 25, 2008; and (b) liquidated damages and interest on  
5 contributions paid, but paid late, in the amount of \$8,937.78 as of May 25, 2008. Interest will  
6 continue to accrue at the rate of 1.5% each month during the pendency of this lawsuit.

7 In addition, pursuant to ERISA Section 409(a), 29 U.S.C. § 1109(a), plaintiffs request  
8 that the Court grant plaintiffs such further remedial relief as the court deems just and proper.

9 WHEREFORE, plaintiffs pray for judgment as follows:

10 **VI. RELIEF REQUESTED**

11 1. On the First Claim for Relief, for damages for breach of the collective bargaining  
12 agreement for judgment against the defendants, and each of them, (a) for unpaid contributions  
13 (not reported, not paid) in the principal amount of \$16,629.74 plus interest and liquidated  
14 damages in the sum of \$12,154.11 through May 2008; and (b) liquidated damages and interest  
15 on contributions paid, but paid late, in the amount of \$8,937.78 as of May 25, 2008, and such  
16 other or further amounts as may be shown at trial, for costs of suit, attorneys' fees and for such  
17 other further relief as the Court may deem just and proper.

18 2. On the Second Claim for Relief, for recovery under ERISA § 502(g)(2), 29 U.S.C.  
19 § 1132(g)(2), for judgment against the defendants, and each of them, as follows: (a) under  
20 Section 502(g)(2)(A) - for unpaid contributions (not reported, not paid) in the principal amount  
21 of \$16,629.74 according to proof at trial; (b) under Section 502(g)(2)(B) – an award of interest  
22 on the unpaid fringe benefit contributions at the rate of 1.5% per month, from the date of  
23 delinquency, until the date of judgment, calculated to be \$11,854.11 as of May 25, 2008; and (c)  
24 under Section 502(g)(2)(C) – the additional award of an amount equal to the greater of (i)  
25 interest on the unpaid fringe benefit contributions at the rate of 1.5% per month, from the date of  
26 delinquency, until the date of judgment; or (ii) liquidated damages under the Master Agreement  
27 and trust agreements of \$150.00 for each month that defendants failed to timely report and pay  
28 all employee fringe benefit contributions into each Trust Funds, calculated to be \$11,854.11 as

1 of May 25, 2008 and such other or further amounts as may be shown at trial, for costs of suit,  
2 attorneys' fees and for such other further relief as the Court may deem just and proper

3 3. On the Third Claim for Relief, for breach of fiduciary duty under ERISA § 409(a),  
4 29 U.S.C. § 1109(a), for judgment against defendant Kurt Thomas McFadden: (a) for unpaid  
5 contributions (not reported, not paid) in the principal amount of \$16,629.74 plus interest and  
6 liquidated damages in the sum of \$12,154.11 through May 25, 2008; and (b) liquidated damages  
7 and interest on contributions paid, but paid late, in the amount of \$8,937.78 as of May 25, 2008,  
8 all additional accrued interest and liquidated damages, and such other or further amounts as may  
9 be shown at trial, for costs of suit, attorneys' fees and for such other further relief as the Court  
10 may deem just and proper.

11 DATED: July 22, 2008

12 BULLIVANT HOUSER BAILEY PC

13  
14 By   
15 Ronald L. Richman

16  
17 Attorneys for Plaintiffs  
Laborers Trust Funds

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